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No. 747

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1940

GEO. H. SHEPPARD, COMPTROLLER OF PUBLIC ACCOUNTS, ET AL,
Petitioners

v.

ORVILLE S. CARPENTER,
Respondent

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT WITH SUPPORTING BRIEF

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v.

ORVILLE S. CARPENTER,

Respondent

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT

To The Honorable The Supreme Court of the United States:

The petition of Geo. H. Sheppard, Comptroller of Public Accounts for the State of Texas, and Charley Lockhart, State Treasurer of the State of Texas, for a writ of certiorari to the Supreme Court of Texas, respectfully shows to this Honorable Court:

I

QUESTION PRESENTED

This case relates to the right of the respondent, Orville S. Carpenter, to draw his salary as a civil officer under the State of Texas while engaged in the active military service of the United States.

The determination of this case depends upon the decision of the following questions, to-wit:

(a) Whether the respondent, Orville S. Carpenter, retained his status as an officer in the National Guard of Texas after having entered into the active military service of the United States in compliance with the order of the President of the United States, issued under authority of Public Resolution No. 96 Seventy-sixth Congress, approved August 27, 1940;

(b) Whether the civil office held by respondent under the State law was vacated in virtue of Section 576, Title 10 U. S. C. upon his entering into the active military service of the United States in compliance with the President's orders;

(c) Whether the holding of the Supreme Court of Texas has denied to petitioners any right, privilege or immunity under the Fourteenth Amendment; and

(d) Whether such holding of the Supreme Court of Texas has violated Art. 1, Sec. 8 of the Constitu-

tion of the United States, regulating land forces, organizing, arming and disciplining the militia, and for governing such part of them as may be employed in the service of the United States.

The Supreme Court of Texas held that the respondent retained his status as an officer in the Texas National Guard after entering into the active military service of the United States, and therefore that, under the Texas Constitution, he also retained and was entitled to receive a salary for his civil office as Member, Chairman and Director of the Texas Unemployment Compensation Commission. Under the settled law of Texas, if the respondent lost his status as a member of the National Guard upon entering the active military service of the United States, he was no longer entitled to hold and draw a salary for his civil office. The determination of the status of respondent necessarily involved a construction of the Constitution and pertinent laws of the United States, hereinafter copied and referred to specifically. It is the position of petitioners that the Supreme Court of Texas erroneously construed the Constitution and laws of the United States, and therefore ordered the payment to respondent of State funds which it would not have ordered except for such erroneous construction.

The undisputed facts presenting the question stated are as follows:

On February 15, 1937, respondent was appointed a member and made Chairman and Executive Direc-

tor of the Texas Unemployment Compensation Commission for the term ending November 21, 1940. This appointment was duly confirmed, and the respondent duly qualified, and became and was an active member and Chairman and Executive Director of said Commission, which said position is an office or position of honor, trust or profit under the established laws of Texas, within the meaning of Sections 12, 33 and 40 of Article XVI of the Constitution of the State of Texas.

Respondent is a member of the National Guard of the United States, and was on December 28, 1938, a member of the National Guard of the State of Texas, and on said 28th day of December, 1938, was duly commissioned by the Governor of the State of Texas with the rank of Major in the National Guard and assigned to the State Staff Corps.

On January 8, 1939, respondent was given Federal recognition by being commissioned with the rank of Major in the National Guard of the United States.

Pursuant to the terms of Public Resolution No. 96, enacted by the Seventy-sixth Congress, and approved August 7, 1940, respondent was by the President duly ordered into the active military service of the United States, effective September 19, 1940, for a period of twelve months, unless sooner relieved, and was assigned to the Eighth Corps Area Service Command and detailed to duty with the Military Department of the State of Texas at Austin, Texas, for duty in connection with Selective Service Planning

of the State of Texas. In obedience to said order respondent duly reported for the performance of the duties assigned him therein, and has held and exercised the office of Major in the active military service of the United States since September 19, 1940, and has not been relieved therefrom. Respondent has never voluntarily resigned his said civil office under the State of Texas.

II.

STATUTORY PROVISION SUSTAINING THE JURISDICTION OF THIS COURT

This court has jurisdiction to review by certiorari the judgment of the Supreme Court of Texas hereinafter mentioned and described, under Section 344 of Title 28 of the United States Code Annotated, which provides that:

> "(b) It shall be competent for the Supreme Court, by certiorari, to require that there be certified to it for review and determination, with the same power and authority and with like effect as if brought up by writ of error, any cause wherein a final judgment or decree has been rendered or passed by the highest court of the state in which a decision could be had * * * where any title, right, privilege, or immunity is specially set up or claimed by either party under the Constitution, or any treaty or statute of, or commission held or authority exercised under, the United States; and the power to review under this paragraph may be exercised as well where

the Federal claim is sustained as where it is denied."

III.

STATUTES AND CONSTITUTION INVOLVED

The statutes of the United States, under which petitioners specially set up and claim rights, privileges and immunities as public officers clothed by the established laws of the State of Texas with the powers and duties to deal with and disburse under appropriate legislative action the public funds of the State of Texas, are as follows, to-wit:

1. Public Resolution No. 96, Seventy-sixth Congress, effective August 27, 1940:

> "Section 1. That during the period ending June 30, 1942, the President be, and is hereby, authorized from time to time to order into the active military service of the United States for a period of twelve consecutive months each, any or all members or units of any or all reserve components of the Army of the United States (except that any person in the National Guard of the United States under the age of eighteen years so ordered into the active military service shall be immediately issued an honorable discharge from the National Guard of the United States), and retired personnel of the regular army, with or without their consent, to such extent and in such manner as he may deem necessary for the strengthening of the National defense: provided, that the members and units of the

reserve components of the Army of the United States ordered into active Federal service under this authority shall not be employed beyond the limits of the western hemisphere except in the territories and possessions of the United States, including the Phillipine Islands.

"Section 2. All National Guard, Reserve, and retired personnel ordered into the active military service of the United States under the foregoing special authorities shall from the dates on which they are respectively required by such order to report for duty in such service, be subject to the respective laws and regulations relating to enlistments, reenlistments, employment, conduct, rights, and privileges, and discharge of such personnel in such service to the same extent in all particulars as if they had been ordered into such service under existing general statutory authorization."

Section 2, Title 10, of the United States Code Annotated:

"The army of the United States shall consist of the regular army, the National Guard of the United States, the National Guard while in the service of the United States, the Officers Reserve Corps, the Organized Reserves, and the enlisted reserve corps."

Section 355 of the same Title:

"All persons appointed officers in the National Guard of the United States are reserve officers and shall be commissioned in the Army of the United States."

Section 81, of Title 32, "National Guard" U. S. Code Annotated:

"When Congress shall have declared a national emergency and shall have authorized the use of armed land forces of the United States for any purpose requiring the use of troops in excess of those of the regular army, the President may, under such regulations, including such physical examination as he n. , prescribe, order into the active military service of the United States, to serve therein for the period of the war or emergency, unless sooner relieved, any or all units and members of the National Guard of the United States. All persons so ordered into the active military service of the United States shall from the date of such order stand relieved from duty in the National Guard of their respective states, territories, and the District of Columbia so long as they shall remain in the active military service of the United States, and during such time shall be subject to such laws and regulations for the government of the Army of the United States as may be applicable to members of the army whose permanent retention in active military service is not contemplated by law. The organization of said units existing at the date of the order into active Federal service shall be maintained intact in so far as practicable.

"Commissioned Officers and warrant officers appointed in the National Guard of the United States and commissioned or holding warrants in the Army of the United States, ordered into Federal service as herein provided, shall be ordered to active duty under such appointments

and commissions or warrants: provided, that those officers and warrant officers of the National Guard who do not hold appointments in the National Guard of the United States and commissions or warrants in the Army of the United States may be appointed and commissioned or tendered warrants therein by the President, in the same grade and branch they hold in the National Guard.

"Officers and enlisted men while in the service of the United States under the terms of this section shall receive the pay and allowances provided by law for officers and enlisted men of the Reserve forces when ordered to active duty, except brigadier generals and major generals, who shall receive the same pay and allowances as provided by law for brigadier generals and major generals of the regular army, respectively. Upon being relieved from active duty in the military service of the United States all individuals and units shall thereupon revert to their National Guard status.

"In the initial mobilization of the National Guard of the United States, war strength officer personnel shall be taken from the National Guard as far as practicable, and for the purpose of this expansion warrant officers and enlisted men of the National Guard may, in time of peace, be, appointed officers in the National Guard of the United States and commissioned in the Army of the United States."

2. Section 576, Title 10, of the United States Code Annotated, which is as follows, to-wit:

"No officer of the Army on the active list shall hold any civil office, whether by election or appointment and every such officer who accepts or exercises the functions of a civil office shall thereby cease to be an officer of the Army and his commission shall be thereby vacated."

3. Section 8, of Article I of the Constitution, Subsection 16, which is as follows, to-wit:

"The Congress shall have power * * * to provide for organizing, arming, and disciplining the militia, and for the governing such part of them as may be employed in the service of the United States, reserving to the states respectively, the appointment of the officers, and the authority of training the militia according to the discipline prescribed by Congress;"

4. Section 1 of Article XIV (Amendments) of the Constitution for this, the construction placed by the Supreme Court of Texas upon the State constitutional amendments of 1932, upon which construction it has rendered final judgment in favor of respondent awarding a writ of mandamus against petitioners to compel the payment of official salary to respondent for a period of time after the 19th day of September, 1940, the effect of which construction abridges the privileges and immunities of citizens of the United States, and denies to persons within its jurisdiction, to-wit, in the State of Texas, the equal protection of the laws.

IV.

DATE OF JUDGMENT AND DATE OF PRESENTATION OF PETITION FOR CERTIORARI

The judgment of the Supreme Court of Texas was rendered, and its opinion was delivered on October 24, 1940. (R. 34). Petitioners' motion for a rehearing was filed in the said Supreme Court within fifteen days thereafter, as authorized by Article 1762 of the Revised Civil Statutes of Texas, (R. 35) which motion was duly and regularly entertained by the court and was thereafter overruled on the 22d day of November, 1940, (R. 95) upon which overruling the Supreme Court wrote and delivered its opinion (R. 91) whereupon the said judgment of the honorable Supreme Court of Texas then and there became final, under the established laws of Texas.

The honorable Supreme Court of Texas is the highest court of the State in which a decision in this suit could in any event be had. The record of the cause is in the possession of the Supreme Court of Texas. A duly certified transcript of such record is filed along with this Petitioner.

V.

SUMMARY STATEMENT OF THE MATTERS INVOLVED

This suit was instituted by respondent, Orville S.

Carpenter, as an original proceeding in the Supreme Court of Texas, seeking a mandamus against the petitioners as Comptroller of Public Accounts and State Treasurer of the State of Texas, respectively, in their official capacities, to compel the issuance and payment of a warrant for official salary claimed by the Relator therein, respondent herein, for his services as a State officer, member of the Texas Unemployment Compensation Commission for the remainder of the month of September, 1940, after the 19th day (inclusive) of September, 1940. The suit was properly instituted and was maintainable under Article 1735 of the Revised Civil Statutes of Texas. (R. 1).

The respondents—petitioners herein—duly filed their answer in said suit (R. 11), tendering only issues of law, since under the Constitution and established laws of Texas the Supreme Court of Texas has no jurisdiction to determine disputed issues of fact.

Included among the issues of law tendered by defendants in said suit were the issues as to Federal questions of law hereinafter more specifically shown in the next succeeding subdivision of this petition.

To the Relator's petition for a mandamus to compel the payment of his salary, the respondents answered, pleading specifically that under the provisions of Section 12 of Article XVI, and of Section 33 of Article XVI of the Constitution of the State of Texas, relator (respondent herein) vacated his of-

fice as a member of the Texas Unemployment Compensation Commission on September 19, 1940, when on such date he entered the active military service of the United States, and in such service held and exercised the office of Major, same being an office of profit and trust under the United States, thereby changing his status from that of a National Guard officer to that of an officer of the United States Army, and clearly forbidden to hold said office under both State and Federal laws, for which reasons they had no authority, and were forbidden by law, to pay to him the said salary so demanded of them. R. 16-17).

The Supreme Court upon the pleadings rendered its judgment and delivered its opinion, holding, to quote the court's language:

> "The complete answer to the contentions made by the Attorney General is the plain and specific language used in Sections 33 and 40 of Article 16 of the Constitution, above copied herein. Those amendments reflect the will of the people of this State with reference to the members of the National Guard. The clear policy of this State with respect to that matter is plainly expressed therein." (R. 31)

Sections 33 and 40 of Article XVI referred to by the court are as follows, to-wit:

> "Sec. 33. The accounting officers of this State shall neither draw nor pay a warrant upon the treasury in favor of any person, for sal-

ary or compensation as agent, officer or appointee, who holds at the same time any other office or position of honor, trust or profit, under this State or the United States, except as prescribed in this Constitution. *Provided, that this restriction as to the drawing and paying of warrants upon the treasury shall not apply to officers of the National Guard of Texas, the National Guard Reserve, the Officers Reserve Corps of the United States, nor to enlisted men of the National Guard, the National Guard Reserve, and the Organized Reserves of the United States.*

"Sec. 40. No person shall hold or exercise, at the same time, more than one civil office of emolument, except that of justice of peace, county commissioner, notary public and postmaster, *officer of the National Guard, the National Guard Reserve, and the Officers Reserve Corps of the United States, and enlisted men of the National Guard, the National Guard Reserve, and the organized Reserves of the United States, unless otherwise specially provided herein. Provided, that nothing in this Constitution shall be construed to prohibit an officer, or enlisted man of the National Guard, and the National Guard Reserve, or an officer in the Officers Reserve Corps of the United States, or an enlisted man in the Organized Reserves of the United States from holding in conjunction with such office any other office or position of honor, trust or profit, under this State or the United States.*"

For the convenience of this court, we have italicized in the above quotations in each Section the mat-

ter added by the amendments referred to by the court.

VI.

THE PLEADINGS, RULINGS AND METHODS WHICH BRING THE CAUSE WITHIN THE JURISDICTION OF THIS COURT

In the answer of respondents filed in the Supreme Court they pleaded as follows:

"That on January 30, 1939, said Carpenter was by the President of the United States duly appointed and commissioned a Major, Adjutant General's department, in the National Guard for the United States in the army of the United States, for which office he duly qualified.

"That under the authority of Public Resolution No. 96, Seventy-sixth Congress, approved August 27, 1940, said Carpenter was ordered by the President of the United States for a period of twelve months beginning September 19, 1940, unless sooner relieved, and assigned to the Eighth Corps Area Service Command of the army of the United States and detailed to duty with the Military department of the State of Texas, at Austin, Texas, for duty in connection with selective service planning of that State. That in obedience to said order of the President, Carpenter reported for said duty under said order on September 19, 1940, and has from and after that date held and exercised the office of Major in the

active military service of the United States and discharged the duties assigned to him as such officer; that he has not been relieved from such duty nor discharged from such active military service; that for such service under the United States he is entitled, under the laws of the United States, and will demand and receive the compensation attaching to his rank as Major in such service, in the sum of $405.00 per month, from and after September 19, 1940." (R. 14)

In their motion for a rehearing in the Supreme Court of Texas the respondents (petitioners herein) pleaded specially:

"Each of the following statutes and authorities asserts and recognizes that a National Guardsman drafted into the active military service of the United States under Section 111 of the National Defense Act does not, while in that service, occupy the status of a member of the National Guard." (R. 42)

Section 81, Title 32, U. S. C. A.: 'All persons so ordered into the active military service of the United States shall from the date of such orders stand relieved from duty in the National Guard—so long as they shall remain in the active military service of the United States. Upon being relieved from active duty in the military service of the United States all individuals and units shall thereupon revert to their National Guard status. * * * " (R. 42)

In said motion for rehearing the respondents further alleged:

"Congress has seen fit to provide by law as follows: 'No officer of the army on the active list shall hold any civil office, whether by election or appointment, and every such officer who accepts or exercises the functions of a civil office shall thereby cease to be an officer of the army and his commission shall be thereby vacated.' "—Title 10, Section 576, U. S. C. A.' " (R. 50)

"The holding of this court is in direct conflict with the provisions of the Federal laws regulating officers in the active service of the United States army since this court holds that an officer who goes into the active service of the United States retains his status as a National Guardsman of Texas and thereby may hold his civil office and an office in the United States army at the same time, whereas, the Federal law, which is supreme, expressly provides that this status is changed and he is subject only to the rules and regulations of Congress." (R. 50).

They further pleaded in said motion for rehearing:

"The question here presented is whether the decision of this court is the law fixing the status of relator as an officer of the National Guard of Texas when he goes into the active duties in the United States army and thereby let him hold a civil office in Texas while serving as an officer in the United States army or whether Congress has the power to fix his status and deny the relator the right to hold any civil office of honor trust under this State. If Congress has the power to fix the status of relator while he is in the

active service of the United States army, then it has expressly denied him the right to hold said office in unmistakable terms." (R. 51-52)

Respondents likewise set forth in their motion for rehearing in the State Supreme Court as follows:

"In Article I, Section 8, of the Constitution of the United States, it is provided among other provisions as follows:

> 'The Congress shall have power to make rules and regulations for the government of land and naval forces;—to provide for organizing, arming, and disciplining the militia, and for governing such part of them as may be employed in the service of the United States, * * * to make all laws which shall be necessary and proper for carrying into execution the foregoing powers, and all other powers vested by this Constitution in the government of the United States or in any department or officer thereof.'" (R. 49)

"Article VI, paragraph 2, of the United States Constitution, provides:

> 'This Constitution and the laws of the United States which shall be made in pursuance thereof * * * shall be the supreme laws of the land; and the judges in every state shall be bound thereby, anything in the Constitution or laws of any state to the contrary notwithstanding.'"

"The provisions of the Constitution of the United States above quoted make it clear that the State of Texas cannot by statute or constitutional provision pass any law which attempts to fix the status of an officer in the National Guard of Texas beyond the day when such officer becomes an active officer of the United States Army by call of the President in times of emergency as provided by Congress." (R. 49)

In the same motion the respondents further pleaded:

"This court has stated on page 4 of its opinion, 'that this State retains a right concurrent with that of the United States Government, to organize and train its Militia.' This holding obviously is made as a predicate for the ultimate decision upon the conception (and express holding) that the status of members of the National Guard of Texas abides with those members even after they have regularly entered the active military service of the United States Government under the order of the President. In this sense we submit the authority or right of the State is not concurrent with that of the United States with respect to its (the State's) Militia after that portion of the Militia, to-wit, the National Guard, has been ordered into the active military service of the United States." (R. 47-48)

Finally, in said motion for rehearing respondent pleaded that the State court's construction of the

amendment to Article XVI, Section 40, of the State Constitution, renders the amendment violative of the Fourteenth Amendment to the Federal Constitution. (R. 52). The plea expressly made the point:

"Thus, the court decides that even as between members of the National Guard, the people of Texas intended to make an unjust discrimination and to deny to a large portion of the National Guard membership the equal protection of the laws in violation of the Fourteenth Amendment to the Federal Constitution." (R. 58-59)

The pleading of such respective Federal questions in these respondents' motion for a rehearing in the State Supreme Court was justified and, we submit, within the well-established rules and decisions of this court, because the Supreme Court of Texas had never theretofore made any holding of the kind in said motion complained of, and the respondents therein had no reason to expect, nor did they expect, that the Supreme Court of Texas would make such holdings thus infringing upon the laws of the United States.

Moreover, these petitioners would show that the relator in the State court himself drew into the cause a Federal question in this, that he alleged his exact status in the United States Army and sought in his petition to recover compensation for a service in connection with a civil office in the State of Texas which, under the Federal law he was and is expressly forbidden to hold, viz.:

"That relator is a member of the National Guard of the United States and of the State of Texas, and on the 28th day of December, 1938, he was duly commissioned by the Governor of Texas with the rank of major in said National Guard and assigned to the State Staff Corps. That he has been given Federal recognition with the rank of major in the National Guard of the United States and of the State of Texas, and n the 3t0h day of January, 1939, he was commissioned with the rank of major in the National Guard of the United States in the army of the United States, and relator now holds said rank in said service.

"That pursuant to proclamation of the President, under authority of Public Resolution No. 96 enacted by the 76th Congress, approved August 27, 1940, relator was by command of Major General Broees, Commander of the Eighth Corps Area of the United States, ordered to active duty, effective September 19, 1940, for a period of twelve months, unless sooner relieved, and assigned to the Corps Area Service Command and detailed to duty with the Military Department of the State of Texas, at Austin, Texas, for duty in connection with selective service planning of the State of Texas under Senate Bill No. 4164, 76th Congress, 3rd Sessino, known as the Selective Training and Service Act of 1940, being an act to provide for the common defense by increasing the personnel of the armed forces of the United States and providing for its training. That in obedience to said order, relator reported for the duties assigned to him thereunder and has been discharg-

ing such duties since September 19, 1940, and has not been relieved therefrom." (R. 2-3)

The Supreme Court of Texas, however, notwithstanding said pleas and matters herein shown, overruled respondents' said motion for a rehearing and thereby made final its prior decision awarding to relator the writ of mandamus, and in so doing disclosed that said contention of a Federal question was recognized as being before it, and necessarily overruled and disregarded each and all of said pleas and suggestions, (R. 91) thereby bringing this cause clearly within Subdivision (b) of Section 344, of Title 28, of the United States Code Annotated.

These petitioners would show that in their capacities as State officers handling and controlling the fiscal affairs and disbursing the public funds of the State of Texas, in which capacities, respectively, they have been sued herein, they are hurt, prejudicially affected, and have been denied rights, immunities, and privileges vouchsafed by the statutes and Constitution of the United States, as herein shown.

VII.

STATEMENT OF GROUNDS UPON WHICH IT IS CONTENDED THAT THE FEDERAL QUESTIONS INVOLVED ARE SUBSTANTIAL

While the amount of money involved in this im-

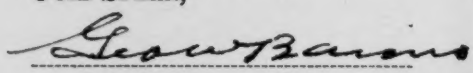
mediate suit is small, the questions of governmental authority involved, especially at this moment of stress throughout the country, are of real and very substantial importance. It is submitted that this case, as rendered by the Supreme Court of Texas, ignores if it does not challenge the supreme power of the Constitution and the Congress of the United States in the matter of the exclusive authority and control over the Federal officers in the active Army of the United States as against the subordinate and inferior right of the State to appoint and to utilize such Federal officers for purposes of State local concern.

WHEREFORE, your petitioners respectfully pray that a writ of certiorari be issued out of this Honorable Court, directed to the Supreme Court of Texas, commanding that court to certify and send to this court on a day to be therein named, for its review and determination a full and complete transcript of the records and proceedings had in said court and entitled on the docket No. 7796, Orville S. Carpenter, Relator, vs. George H. Sheppard, Comptroller of Public Accounts, et al, Respondents, to the end that this cause may be reviewed and determined by this court, as provided by the statutes of the United States, and that the judgment of the said Supreme Court of Texas be reversed by this court, and for

such other and further relief as to this Honorable Court may seem right and proper.

Respectfully submitted,

GERALD C. MANN,
Attorney General of Texas
GROVER SELLERS,
First Assistant Attorney General
R. W. FAIRCHILD,
OCIE SPEER,



GEO. W. BARCUS,
Assistant Attorneys General
Counsel for Petitioners.

NO.....

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1940

GEO. H. SHEPPARD, COMPTROLLER OF PUBLIC ACCOUNTS, ET AL.,
Petitioners

vs.

ORVILLE S. CARPENTER,
Respondent.

SUPPORTING BRIEF OF AUTHORITIES AND ARGUMENT ANNEXED TO PETITION OF PETITIONERS.

To The Honorable The Supreme Court of the United States:

Preliminary: The petitioners herein annex to their petition the following supporting brief of authorities and argument, in pursuance of the privilege conferred in Section 2 of Rule 38 promulgated

by the court, reserving to themselves, if permissible, the right hereafter timely to file a more complete brief should the petition be granted.

The question presented for the Court's consideration is shown in subdivision 1 of the petition. A concise statement of the grounds on which the jurisdiction of the court is invoked is shown in the petition at subdivisions II and III thereof.

It is thought a sufficient statement of the case appears at subdivision V of the petition.

Parties—interest: At the threshold of a consideration of the case there arises the question of parties—petitioners.

We are not unmindful of that wholesome rule that courts of justice do not sit to decide or pass upon abstract questions of law or right, but their function (ordinarily) is to protect rights and redress wrongs. If the petitioners have no justiciable interest in the matter presented, the proceeding is at an end for, "not a law alone but a law and its incidence are necessary to a justiciable right or injury."—*Clark* v. *Kansas City*, 176 U. S. 114, 44 Law Ed. 392.

Neither are we unmindful of the fact that this Court has in many cases decided that a petitioner who does not have such justiciable interest in the subject matter of the proceeding asserts that right on behalf of another, whether that other actually has or does not have such right.

Such holding was made in each of the following cases:

Caffrey v. *Oklahoma*, 177 U. S. 346, 55 Law Ed. 799, relator as County Clerk of Oklahoma County sought a writ on the theory that the taxpayers of the county were threatened with injury in violation of a constitutional right.

City of Lampasas v. *Bell*, 180 U. S. 276, 45 Law Ed. 527, involved the right of the City of Lampasas to invoke a constitutional right in favor of the taxpayers of such city, and this Court, in dismissing the writ of error, said:

> "To permit it to come here directly from the Circuit Court would make a precedent which would be to the destruction of the statute. We repeat, the questions which can be raised under any of the subdivisions of Section 5 of the Act must be real, the controversies they present must be substantial, not only from the nature of the principles invoked, but from the relation of the party to them by whom they are invoked."

Smith v. *Indiana*, 191 U. S. 138, 48 Law Ed. 125, involved a county auditor who sought error to a state court, and this Court, in dismissing the writ, said:

> "It is evident that the auditor had no personal interest in the litigation. He had certain duties as a public officer to perform. * * * We think the interest of an appellant in this court should be a personal, and not an official, inter-

> est, and that the defendant, having sought the advice of the courts of his own state in his official capacity, should be content to abide by their decision."

In *Braxton County Court* v. *West Virginia*, 208 U. S. 192, 52 Law Ed. 450, Mr. Justice Brewer said:

> "Again, that the act of the state is charged to be in violation of the National Constitution, and that the charge is not frivolous, does not always give this court jurisdiction to review the judgment of the state court. The party raising the question of constitutionality and invoking our jurisdiction must be interested in, and affected adversely by, the decision of the state court sustaining the act and the interest must be of a personal, and not of an official nature."

These cases are not all, but they are typical of that line of decisions announcing the unquestioned doctrine that altruistic willingness of a petitioner will not confer upon him the right to invoke a legal remedy on behalf of one who has been injured through a violation of his constitutional rights, where the petitioner himself has sustained no legal injury, and especially of the supposed rule that *official* interest of a petitioner is not enough.

If the present case can not be distinguished from such cases, it must fail for want of a justiciable interest in the petitioners.

Candor compels us to say that is perhaps the most

doubtful question involved in the case. But equal good faith will permit us to say that we believe this case is distinguishable from those cited and others of the kind.

In the nature of sovereignty, no state can have a general agent. Yet, in the nature of sovereignty, the state being a legal entity only, must act in every instance through human agencies or other instrumentalities.

The State of Texas is not nominally a party to this proceeding, but in the essence of things, it is a real party at interest. The real substance of the suit—the res—is a sum of money representing the salary of the respondent claimed as a state officer from the 19th day of September, 1940, to the 30th day of September, 1940, inclusive, which sum could only be paid, and has been ordered by the Supreme Court of Texas to be paid out of the State treasury from funds constitutionally belonging to the State of Texas, and which can only be paid under constitutional limitations through the instrumentality of officers or personal agents such as the relators.

The gist of the contention we are trying to make is, of course, that under the facts of this case the petitioners are not mere volunteers in assuming to invoke constitutional protection of the fund, on the contrary they are the constitutionally designated representatives of the State itself with respect to the payment out of its public funds, and they therefore occupy a status with respect to the State of

Texas akin to that of an *alter ego.* In the mandamus suit lying at the bottom of this proceeding, these petitioners in legal effect stand in the shoes of the State of Texas, and the situation is precisely the same as if the State of Texas itself were presenting this petition for certiorari to the judgment of the Supreme Court. Indeed, abundant decisions of the Supreme Court of this State establish the doctrine under our State jurisprudence that such a suit is in legal effect one involving the State, and where such officers are plaintiff they are not required to execute bonds or give other security for costs on appeal and the like. Where they are made defendants it is only because of the legislative authority to institute such suit, the same being considered one against the State. Articles 1733 and 1735 of our Revised Civil Statutes attest this law of the State.

The following decisions further will verify what we have said with respect to the real parties at interest in such suits, to-wit:

Pertinent to the established law of Texas with respect to parties in suits involving the public funds of the State of Texas, we call this Court's attention to *Terrell, Comptroller,* v. *Middleton,* 187 S. W. 367, commonly known in Texas as the "Governor's Chicken Salad" case, wherein it is held that a taxpayer in the State may institute and maintain a suit respecting the unlawful expenditure of public funds. In such a case, however, his justiciable interest does not rest upon the same solid basis as that of the State. It is only an equitable one, whereas, the in-

terest of the State held through its lawful custodian is the real title.

It would be an anomalous thing to hold that an individual taxpayer in Texas, whose right in the subject matter could at best be a mere trifle—will be allowed to institute and prosecute such a suit, and at the same time to hold that the State of Texas whose interest is the real title to the entire extent of public funds in possession of its Treasurer, and who in the nature of things can only act in circumstances such as are involved here through the instrumentality of the very State officials now knocking at the door of this Court. Such a holding, we respectfully submit, would not be in keeping with the common understanding, and moreover would not be in keeping with soundly considered juristic principles.

In *Buchanan* v. *Alexander*, 4 How. 20, 11 Law Ed. 857, it was held that governmental funds in the hands of a purser were nevertheless governmental funds, and not liable to attachment by a creditor of seamen to whom the money was destined to be paid, the court saying:

> "The important question is, when does the money in the hands of the purser, though due to the seamen for wages, become attachable. A purser, it would seem, cannot in this respect, be distinguished from any other disbursing agent of the Government. If the creditors of these seamen may, by process of attachment, divert the public money from its legitimate and appropriate object, the same thing may be done

> as regards the pay of our officers and men of the Army and of the Navy; and also in every other case where the public funds may be placed in the hands of an agent for disbursement. To state such a principle is to refute it. No government can sanction it. At all times it would be found embarrassing, and under some circumstances it might be fatal to the public service."

The facts of that case are not identical with those of the present case, to be sure, but the wholesome principle announced in the opinion supports the distinction we have sought to make. The words thus fitly spoken are "like apples of gold in pictures of silver."

The rule is illustrated in the many cases involving the liquidation of insolvent estates with respect to priorities in favor of the United States. It is the substance of the situation and not its form that controls the very right of the government.

If a Federal question is here involved—and that only this Court can finally decide—it would seem that petitioners as the sole representatives of the State, and as actual custodians of the funds sought to be taken from them, are preeminently the proper persons to urge that question. To deny them this right would permit a juridical debacle that is unjustifiable. They would be thus compelled to pay from State public funds the salary of a State civil officer for a supposed service he never performed, for a time when he conceivably could have been in the Philippines in

the active discharge of his military duties, under the statute that expressly forbids him to "hold or exercise any civil office." (Sec. 576, Title 10, U. S. C. A.)

Under the holding of the Texas Supreme Court, and under the undisputed facts, respondent has vacated his State office in virtue of the statute above cited, and that without judicial determination perforce of the act of the Congress itself.

Perhaps *Coleman* v. *Miller*, 307 U. S. 433, 83 Law Ed. 1385, is the most luminous discussion of the question of parties petitioner to be found in the decisions. That case holds that members of a State Senate may rightfully invoke the jurisdiction of the Supreme Court to review on certiorari a decision of the State Supreme Court with respect to a Federal question drawn into the case. The case is valuable not only for the point actually decided but likewise for the general discussion illustrative of the character of interest that would make eligible a petitioner to raise the Federal question involved in his petition. The case further has unusual value because of its citation and approval of *Boynton* v. *Hutchinson Gas Co.*, 291 U. S. 656, 78 Law Ed. 1048, as to which this court has said, "Because of its importance, and contrary to our usual practice, the court directed oral argument on the question whether certiorari should be granted and after that argument, upon mature deliberation, granted the writ." We invite the court to consider this case in its entirety as, we know it will, and especially do we call attention to the following language therein:

> "This class of cases in which we have exercised our appellate jurisdiction on the application of state officers may be said to recognize that they have an adequate interest in the controversy by reason of their duty to enforce the state statutes the validity of which has been drawn in question. In none of these cases could it be said that the state officers invoking our jurisdiction were sustaining any 'private damage.'"

There is, therefore, no hard and fast rule that an official interest only is not the interest required to obtain review. It is at last—as it always has been and ought always to be—one of discretion for this Court, having in mind the substance and not the form of the qualifying interest of the petitioner. Every taxpayer, and even every person whether taxpayer or not in the State has an interest of a kind in the subject matter of this suit; but the petitioners have a peculiar and substantial interest in this particular suit beyond that of any other individual. Moreover, as State officers, they have the means (through representation by the Attorney General) of presenting and prosecuting such complaint not possessed by private citizens. Yet another consideration accentuates the peculiar interest of these petitioners in the Federal question involved, it is this: The petitioners in their official capacities are charged with the legal duty—under heavy sanctions —of safeguarding, and accounting for the State public funds. Can it be denied the right of safeguarding and safekeeping in correlation to this duty?

If a thief were to break through to steal, the rat-a-tat-tat of a machine gun would be lawful. Can it be that the more peaceful appeal to the Court for a writ should be denied?

Form of Raising Federal Question. There appears to be no precise form for raising the question of involvement of a Federal question. The language of the jurisdictional statute is broad and significant. It is enough that the Federal question is "drawn in question"—in any fair way.

The matter of sufficiency is always and finally for the Supreme Court. (*Lovell* v. *City of Griffin*, 303 U. S. 404, 82 L. Ed. 949; *International Steel & Iron Co.* v. *National Surety Co.*, 297 U. S. 657, 80 Law Ed. 961; *Carter* v. *Texas*, 177 U. S. 442, 44 Law Ed. 839).

Question Necessarily Passed on Below: If the Federal question necessarily has been decided, it of course has been "drawn in question," and that is enough for jurisdictional purposes. (*Whitney* v. *People*, 274, U. S. 357, 71 Law Ed. 1095; *Furman* v. *Nichol*, 8 Wall. 44, 19 Law Ed. 370).

These petitioners, we respectfully submit, directly raised the Federal questions relied on in this application; (See Pet. par. VI) but whether so or not, it would seem a Federal question was necessarily drawn in the case when the State court considered the Constitution of Texas as amended in 1932 with respect to National Guards, and such question was necessarily decided when it held that the amendments finally

determine the controversy in favor of the respondent Carpenter. This is true for two reasons; first, if the Texas amendment is a literal warrant for the officer's dual office holding, it is void as being in contravention of Section 576 Title 10 of the United States Code, declaring that "No officer of the army on the active list shall hold any civil office whether by election or appointment." The two laws can not stand at the same time. One must fall and of course that one is the State law. The Federal law is supreme and all courts must know this and respect that supremacy.

In the second place, the decision of the State court expressly is put upon the ground that the status of the officer as a member of the National Guard was not changed upon his being inducted into the active service of the Government but abides with him, whereas the Act of the Congress expressly declares:

> "All persons so ordered into the active military service of the United States shall from the date of such order stand relieved from duty in the National Guard of their respective states, * * * so long as they shall remain in the active military service of the United States. * * *
>
> "Upon being relieved from active duty in the military service of the United States all individuals and units shall thereupon revert to their National Guard status." (Sec. 81, Title 32, U. S. C. A.)

If the amendment of the Texas Constitution in this respect fixed the status of respondent Carpen-

ter after September 19, 1940, when he became an officer in the active service of the United States, it, and the holding of the Supreme Court of Texas as well, violate the National Guard Act above quoted. Both can not stand as the law upon the subject, and of course, the Federal Act is the supreme law governing.

Necessarily the State court could not have decided these questions as it did without deciding the effect or lack of effect of the Federal Acts here being urged as applicable and controlling.

Erie Railroad v. *Purdy*, 185, U. S. 148, 46 Law Ed. 847; *Williams* v. *Keys*, (Fla.) 186 So. 250; Montgomery v. *Hernandez*, (U. S.) 12 Wheat, 129, and the many other cases cited in Annotation to Section 344, n. 49, Title 28, U. S. C. A.)

Question discussed by the Lower Court: In the nature of things where the State court discusses the Federal question the same is "drawn in question" for jurisdictional purposes. (*Whitfield* v. *Ohio*, 297 U. S. 431, 80 Law Ed. 778; *Northwestern Bell Tel. Co.* v. *Nebraska State Ry. Com.*, 297 U. S. 471, 30 Law Ed. 810; *Home Ins. Co.* v. *Dick*, 281 U. S. 397, 74 Law Ed. 926).

The State court expressly recognized that the Federal questions here being consdiered were before it and actually discussed them in its opinion on rehearing in the following language:

"The Attorney General in substance contends in his motion for rehearing that this Court erroneously held in its original opinion that the calling of relator to service as a member of the National Guard of the United States did not result in his vacating the civil office held by him in this State, and that such holding violates certain provisions of the law passed by Congress. The Attorney General contends that the following Federal statute upholds his contention that relator has vacated his State office by assuming the status of an officer in the United States Army under the conditions shown by this record:

" 'No officer of the Army on the active list shall hold any civil office, whether by election or appointment, and every such officer who accepts or exercises the functions of a civil office shall thereby cease to be an officer of the Army, and his commission shall be thereby vacated.' Title 10, Section 576, U. S. C. A.

"Furthermore, in support of this contention the Attorney General strongly relies upon the following cases, among others: *United States ex rel. Gillett* v. *Dern, Secretary of War, et al.*, 74 F. (2d) 485, and *Thomas L. Fekete, Jr.* v. *City of East St. Louis*, 315, Ill. 58, 145 N. E. 692, 40 A. L. R. 650.

"The provisions of the statute above quoted do not, either directly or by implication, sustain the contention of the Attorney General. If it should be held that this relator occupies the status of an 'officer of the Army on the active list,' and that the State office he now holds is a 'civil office,' both within the

meaning of the above statute—a question we do not decide, but leave to the Federal authorities to decide —still such statute makes no provision that an officer included within its terms vacates his civil office." (R. pp. 92-93)

Professing not to decide the federal question of vacating the civil office by section 576, the Court actually has assumed to decide that very question.

Federal Question Raised First Time on Rehearing: The Federal questions herein presented were raised more specifically perhaps in the motion of these petitioners for a rehearing in the State Supreme Court than previously. This, we understand is sufficient, where, as here, the questions were actually considered and decided as shown by the record. The rule that such belated presentation is not sufficient has no application to such a case. The purpose of a timely raising of the Federal question has been subserved. *Great Northern Ry. Co.* v. *Sunburst Oil & Refining Co.*, 287 U. S. 358, 77 Law Ed. 360.

Extent of the Right of Petitioners to Complain: We most respectfully submit that if any Federal question is presented and if these petitioners have the necessary interest in the subject matter to present error at all, then they may present and have determined every ground that makes the judgment or decree of the State court violative of the Federal law, whatever that ground of decision may be. In other words, the injury to these petitioners—the unlawful deprivation of the possession of the public funds—

is identically the same whatever the nature, source and extent of the error underlying the decision, if that *decision* involves any "title, right, privilege, or immunity" within the scope of Section 344 (b) Title 28 United States Code Annotated.

The necessary "incidence" is present when there has been rendered a judgment or decree denying the petitioners a title, right, privilege or immunity claimed under the Federal Constitution, statutes or laws. Thus the holding of the State court in misconstruing the State Constitution in such way as to make it violative the Federal law is no more to be excused than if it had made its decision in the absence of a State constitution or statute.

So that, we urge the vice of the *decision* whatever the grounds or *absence* of grounds given therefor by the State court. Explicitly we submit the court's construction of the amendments of Sections 33 and 40 of Article XVI of the State Constitution, wherein it held such amendments to authorize respondent Carpenter, an officer in the National Guard of Texas, to hold and exercise his office of major on the active list of the United States Army after having been ordered into such active service and after he had been duly appointed and qualified for such active official service was and is in violation of the Fourteenth Amendment to the Constitution of the United States in this that such construction of the amended sections, in that they abridge the privileges of citizens of the United States, and deny to persons within

the jurisdiction of the United States the equal protection of the laws.

Specifically these sections amended in 1932, as construed by the Texas Supreme Court, vouchsafe to those persons who had been members of the National Guard of Texas, (such as respondent Carpenter) the privilege thereafter to hold an office on the active list in the army of the United States of America, and at the same time to hold a civil State office in Texas; whereas such privilege of dual office holding is denied to other persons in the State who have been drafted, accepted, or otherwise ordered into active service in the United States Army, and who may have been commissioned to an office in the army.

This is not the equal protection of the laws to the citizens of the United States who reside in Texas.

If the Constitution of Texas as amended is thus in violation of the Fourteenth Amendment, it is void and the decision of the State court has denied these petitioners titles, rights, privileges and immunities under Federal laws.

If we are correct in our contention that respondent has the status of that of an officer of the United States Army, and not that of a National Guardsman, as held by our Supreme Court, then it follows that he vacated his civil office on becoming an officer in the United States Army, under the plain provisions of Section 12 of Article XVI of the Texas Constitution, as interpreted by the Court of Criminal

Appeals, a court of last resort, of this State, in the case of *Lowe* v. *State*, 201 S. W. 986, from which we quote:

> "It seems that when one accepts an incompatible office with the one he holds he has the right of election to abandon one of them (Cyc. vol. 23, p. 518; Webb v. Reynolds (Civ. App.) 160 S. W. 153), but that, when an officer of the state accepts an office of profit in the military service of the United States, his tenure as judge ceases by virtue of the constitutional provision contained in Article 16, Section 12, supra."

Moreover, we think, if the attempted amendment of 1932 is *void* it did not operate to change in any way Section 33 of Article XVI, which itself expressly forbids payment of salary to a dual office holder such as is involved here.

Grounds for Decision other than Federal Question: We understand the established rule to be that where the decision of the State court is based upon a valid State law entirely sufficeint within itself to support the decision, the Supreme Court will not interpose a writ. But if such State law itself be in violation of Federal law the court will be quick to hear the case.

In *Thompson* v. *Consolidated Gas Utilities Corp.*, 300 U. S. 55, 81 Law Ed. 510, it is said:

> "* * * But, being under duty to make an independent study of the question, we have done so. That study leaves us in grave doubt whether the lower court has correctly interpreted the

intention of the law makers. On the other hand, we are clearly of opinion that if the Act were construed as the defendants contend it should be, and as the Commission has applied it, it would violate the Federal Constitution. As a general rule it is no less true with reference to State than to Federal legislation that this Court will not decide an issue of constitutionality if the case may justly and reasonably be decided upon a construction of the statute under which the act is clearly constitutional. Compare Bratton v. Chandler, 260 U. S. 110, 114, 67 L. Ed. 157, 161, 43 S. Ct. 43; South Utah Mines & Smelters v. Beaver County, 262 U. S. 325, 331, 67 L. Ed. 1004, 1007, 43 S. Ct. 577; Hopkins v. Southern California Teleph. Co., 275 U. S. 393, 403, 72 L. Ed. 329, 337, 48 S. Ct. 180. But where one party's case depends upon a construction of a state statute under which it plainly must be held to violate the Federal Constitution, and where the proper construction of the statute is a matter of grave doubt, this Court will rest its decision on the Constitution, and will not undertake to decide the question of construction as to which it lacks the power to give a definitive answer."

See also: *International Steel & Iron Co.* v. *National Surety Co.*, 297 U. S. 657, 80 Law Ed. 961.

Evasion of Decision of Federal Question: If the Federal question be actually "drawn in" the case, the State Court may not by evasion of decision forestall Federal review. The disposition of the matter is not so easy as that. (*Broad River Power Co.* v. *State*, 281 U. S. 537, 74 Law Ed. 1023; *McCoy* v. *Shaw*, 277 U. S. 302, 72 Law Ed. 891.)

The Federal questions were affirmatively raised, we think, but if mistaken in that, we submit the court considered, discussed and necessarily decided them, even if there has been no intentional evasion of decision.

Illustrative Cases thought to be Pertinent: We beg to submit the following authorities which are thought to be pertinent to the principal questions presented. For convenience sake, we have made parenthetical quotations or comments to show the pertinence of the case.

Coleman et al v. Miller, Secretary of State, 307 U. S. 433, 83 Law Ed. 1385. (This case has been cited by us under the subject of parties in the beginning of this brief of argument.)

Ex parte Caplis, 275 Fed. 980, ("The record from the Adjutant General's office shows that this form 1014, embodying the order referred to, was mailed to each of the petitioners on March 19, 1918, and addressed to Taylor Town, La., being the address given by petitioners when they registered. At the time of issuance and mailing of this order, both petitioners had long since fled the country. Neither has been discharged from the military service, if either can be said to be or to have been in the military service. *If they are soldiers, their status as civilians must have been changed by some law of the United States.")*

Blackington v. U. S., 248 Fed. 124, ("In this case it appears that the appellant is now a soldier in the United States Army, having been

drafted into that service pursuant to Section 111 of the National Defense Act of June 3, 1916, (39 Stat. 166, 211), and of Section 1, Subd. 2, of the National Conscription Act of May 18, 1917, on August 5, 1917, at which time he was examined by the Federal medical officers and accepted into said United States service, and said examination is not shown to have been in manner irregular or unfair. *In view of the above, we are of opinion that his present status as a soldier is determined by the draft of August 5, 1917.")*

Ex parte Dostal, 243 Fed. 664, ("These cases fully sustain the views above expressed touching upon the force and effect of the National Defense Act and of the Selective Draft Law. They are authority for the proposition that a member of the National Guard becomes a part of the military force of the United States from the date of the draft order. They are also authority to sustain the power of Congress and the President thus to draft compulsorily into the service of the United States all officers and enlisted men of the National Guard. The power to raise, organize, and equip armies, and to provide for the common defense, conferred by the Constitution (Article 1, Sec. 8 cls. 10, 11, 12, 13, 14, 15 and 17; Section 10 cl. (3) is practically unlimited.")

Harvard Law Review, Vol. LIV No. 2, p. 201, ("Moreover, every officer and enlisted man of the National Guard was required to take a dual oath—to support the Nation as well as the State, to obey not only the Governor but also the President. This was required to implement the draft provision, Section 1111, under which, whenever

Congress authorized the President the use of troops in excess of the regular forces, the President might draft into Federal service the members of the National Guard, and the National Guard Reserve. All persons so drafted stood discharged from the militia and were liable to service for the duration of the war.")

Opinion Acting Judge Advocate General Ansell to the Chief of the Militia Bureau of the United States of date October 22, 1917, ("There is, then no such thing as drafting the National Guard into the Federal service as such; only its members as individual citizens are drafted. The National Guard * * * is not drafted. There is no connection in the eyes of the law between the status which an individual occupies as a member of the National Guard, and the status which he occupies after he has been drafted into the service of the United States. * * * ")

Fekete v. City of East Saint Louis (Ill.) 145 N. E., 692, 40 A. L. R. 650, ("It is clear plaintiff was not, after his appointment as captain in the United States Army, a member of the Illinois National Guard.")

Ex parte Dailey, (Tex. Crim. Rep.) 246 S. W. 991, 26 A. L. R. 138, "Where the term 'civil officer' is employed, it is shown it is meant to exclude an officer of the militia. We are of opinion that a reading of the entire Title and the various chapters of the Revised Civil Statutes relative to the National Guard makes it clear that an officer of that body is a 'military' and not a 'civil officer,' and therefore are constrained to hold that, under the wording of Section 40, Article XVI of our Constitution while

Honorable Horton B. Porter at the same time he was District Judge of the 66th Judicial District, was also holding a commission as Captain of Company L, 143d Infantry in the National Guard, he was not holding two civil offices."

Home Insurance Co. v. Dick (U. S.) 74 Law Ed. 926, ("That the Federal questions were not raised in the trial court is immaterial. For the Court of Civil Appeals and the Supreme Court of the State considered the questions as properly raised in the appellate proceedings and passed on them adversely to the Federal claim. Chicago R. I. & P. Ry. Co. v. Perry, 259 U. S. 548, 551, 66 Law Ed. 1056, 1058, 42 Sup. Ct. Rep. 524; Sully v. American National Bank, 178 U. S. 289, 298, 44 Law Ed. 1072, 1076, 20 Sup. Ct. Rep. 935. The case is properly here on appeal.")

Milsaps College v. Jackson, 275 U. S. 129, 72 Law Ed. 196, ("While in cases like this 'we form our own judgment as to the existence and construction of the alleged contract, and are not concluded by the construction which the state court has placed on the statute that forms such contract, yet we give to that construction the most respectful consideration and it will in general be followed, unless it seems to be plainly erroneous.' Also, we think, the rule as to the construction of statutes of exemption from taxation should be applied, and where there is room for reasonable doubt as to total or only partial exemption, the latter alone should be recognized. Great weight attaches to the decision of a state court regarding questions of taxation or exemption therefrom under the Constitution or laws of its own state.")

Mathews v. McStea, 20 Wall. 646, 22 Law Ed. 448, ("We are of opinion that the only question made and decided in this case against plaintiff in error, was the sufficiency of the acts of the President to inaugurate a war which would render invalid this contract, and that this is one of the questions embraced by the Act of February 5, 1867. The motion to dismiss is therefore overruled.")

Fiske v. State of Kansas, 274 U. S. 380, 47 Sup. Ct. Rep. 665, ("A decision of a state court applying and enforcing a state statute of general scope against a particular transaction as to which there was a distinct and timely insistence that if so applied, the statute was void under the Federal Constitution, necessarily affirms the validity of the statute as so applied, and the judgment is, therefore, reviewable by writ of error under Section 237 of the Judicial Code.")

Nutt v. Knut, 200 U. S. 13, 26 Sup. Ct. Rep. 216, ("A party who insists that a judgment cannot be rendered against him consistently with the statutes of the United States may be fairly held, within the meaning of § 709, to assert a right and immunity under such statutes, although the statutes may not give the party himself a personal or affirmative right that could be enforced by direct suit against his adversary. Such has been the view taken in many cases where the authority of this court to review the final judgment of the state courts was involved.")

Boyd v. State of Nebraska, 143 U. S. 135, 12 Sup. Ct. Rep. 375, ("Arrival at this conclusion

(as to citizenship) involved the denial of a right or privilege under the Constitution and laws of the United States, upon which the determination of whether Boyd was a citizen of the United States or not, depended, and jurisdiction to review a decision against such right or privilege necessarily exists in this tribunal.")

Summation of Federal Questions Involved: The State Supreme Court held that the amendment of Sections 33 and 40 of Article XVI of the Constitution excepted respondent from the prohibition against dual office holding. Those claimed exemption clauses are as follows:

"* * * Provided, that the restriction as to the drawing and paying of warrants upon the treasury shall not apply to officers of the National Guard of Texas. * * *"—Sec. 33.

"* * * Provided, that nothing in this Constitution shall be construed to prohibit an officer or enlisted man of the National Guard, * * * from holding in conjunction with such office any other office or position of honor, trust or profit, under this State or the United States. * * *"—Sec. 40.

As thus construed these amendments involve, and the court's decision compasses the following Federal questions:

1. The status of an officer on the active list of the United States Army, as defined by the Congress. (Sec. 81, Title 32, U. S. C. A.)

2. The singleness of office holding by officers on the active list of the United States Army as declared by the Congress. (Sec. 576, Title 10, U. S. C. A.)

3. The exclusive power of the Congress to provide for the common defense; (Const. Art. 1, Sec. 8, cl. 1) to make rules for the government and regulation of the land * * * forces; (Ibid, cl. 14) to provide for organizing, arming and disciplining the militia and for governing such part of them as may be employed in the service of the United States; (Ibid, cl. 16) and

4. The abridgment of the privileges and immunities of citizens of the United States, and the denial to persons within the jurisdiction of the United States of the equal protection of the laws. (14th Amend. Sec. 1)

The holding of the Supreme Court of Texas operates to deny to petitioners the titles, rights, privileges and immunities vouchsafed to them by the above-mentioned constitutional provisions and statutes.

Final Word. We all know that the office of major in the National army in active service and a state civil office are incompatible. It is as true in government as well as in religion that no man can serve two masters.

No man is elected or appointed to a civil office except it be contemplated he will serve the State—exercise the office. No man will be conscripted or

inducted into an office in the active service of the army except that he is needed and will exercise the office.

The State of Texas through the Constitution has, as petitioners believe, forbidden such dual office-holding, and likewise the United States, it is believed, has forbidden such dual office-holding—such divided allegiance.

The only effective remedy of the State was, of course, the forfeiture of the State office for a violation of the Constitution—it has no jurisdiction with respect to the military office.

On the other hand, the United States Congress having full power so to do has declared that, "No officer of the Army on the active list shall hold any civil office * * *," and there being no lack of power to make its fiat binding, it follows, we submit, the effect of Section 576 is to vacate any civil office which the occupant may hold upon his becoming an officer on the active list in the army. If he "*shall not hold*" such civil office he *does not hold* it under such express inhibition. This statute when interpreted properly means that such army officer shall not hold any civil office, and to that end any attempt by him to do so shall be futile—that is, the status of civil officer shall not exist. The latter part of the section is not mandatory but directory, and a proper interpretation of the statute—that is, to effect the purpose of the Congress—would require such interpretation to the end that the army officers should be manned at

all events. The law commands, and conclusively presumes a surrender of the civil office. The civil office being thus vacated, these petitioners as public officials—fiduciaries of the treasury funds in their hands—have no authority to pay the salary claimed by respondent.

Respectfully submitted,

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FEB 19 1941
CHARLES ELMORE CROPLEY
CLERK

Supreme Court of the United States

OCTOBER TERM, 1940

No. 747

GEO. H. SHEPPARD, COMPTROLLER OF PUBLIC ACCOUNTS, ET AL., *Petitioners*,

VS.

ORVILLE S. CARPENTER

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF TEXAS

BRIEF FOR RESPONDENT IN OPPOSITION TO THE PETITION FOR CERTIORARI

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Statement of the Case

This is a mandamus action brought by the respondent Orville S. Carpenter as an original proceeding in the Supreme Court of Texas against petitioners George H. Sheppard, Comptroller of Public Accounts of the State of Texas, and Charley Lockhart, Treasurer of the State of Texas, to compel them to issue respondent a warrant for his salary

for the month of September, 1940, as Chairman and Executive Director of the Texas Unemployment Compensation Commission, and to pay said warrant when issued. The office referred to is a civil State office. Respondent was also an officer in the National Guard of the United States and the State of Texas with the rank of Major, and, on September 19, 1940, he was ordered into the active military service of the United States in virtue of his being an officer in said National Guard.

The case involves respondent's right to hold his State office after he had been ordered into the active military service of the United States. Respondent by his pleadings expressly asserted that this right was secured to him by Sections 33 and 40 of Article XVI of the Constitution of the State of Texas (R., 4-5). On the other hand, it was claimed by petitioners in their pleadings that when respondent was ordered into the active military service of the United States he automatically vacated his State office; and in support of this claim petitioners invoked Section 12 of Article XVI of the State Constitution (R., 11).

Upon the issue thus joined the Supreme Court of Texas held that under the State Constitution, properly construed—the provisions of which were reviewed in detail by the Court—respondent had not vacated his State office and was entitled to payment of the salary attached thereto (R., 12-22).

The case is here on petition for certiorari, based on the claim that the State court's construction of the State Constitution brings its provisions into conflict with the Constitution of the United States and certain Federal statutes.

Summary of Argument

1. This Court has no jurisdiction because:

(a) Petitioners are without sufficient legal interest to present the Federal questions they are attempting to present.

(b) The denial of due process and equal protection claimed by petitioners to result from the State court's construction of the State Constitution affects, not petitioners, but only other persons who are not parties and are not represented by petitioners.

(c) The decision of the State court is based upon a non-federal ground adequate to support it.

(d) The Federal questions attempted to be raised are unsubstantial.

2. If the State court decided any Federal questions, they were correctly decided.

Argument

Point One

This Court Has no Jurisdiction of the Cause

(a) *Petitioners' lack of interest.*

Petitioners are disbursing officers of the State of Texas, whose ministerial duties are plainly defined in statutes mandatory in their application. It is their duty to pay the salaries of all State officers.

Called upon to pay respondent's salary for the month of September, 1940, as the holder of a State offiice, they declined to pay such salary for the entire month, assigning as a reason for their refusal the fact that he was an officer in the National Guard and had been ordered into active service on September 19, 1940, and had responded to such order and had thereby vacated his civil office.

Represented by the Attorney General of the State, petitioners invoked the judgment of the Supreme Court of the State in respect to their duty in the premises. That court, upon full consideration, held that, under certain provisions of the State Constitution (R., 18-22), it was the plain, ministerial duty of the petitioners to make such payment. The State court in its opinion said:

"The complete answer to the contentions made by the Attorney General is the plain and specific language used in Sections 33 and 40 of Article XVI of the Constitution, above copied herein. Those amendments reflect the will of the people of this State with reference to the members of the National Guard.

"* * * *

"By virtue of Sections 33 and 40 of Article XVI of the Constitution, we hold that Relator did not vacate his office as a member and Chairman and Executive Director of the Texas Unemployment Compensation Commission, when called into the military service of the United States and appointed an officer therein. We further hold that his appointment as Major in the United States Army does not violate Section 12 of Article XVI of the Constitution. Therefore he is entitled to be paid his salary."

Petitioners neither gained nor lost anything "by invoking the advice of the Supreme Court as to the proper action they should take." *(Smith v. Indiana,* 191 U. S. 138, 149.) They had only an official, as distinguished from a personal, interest in the questions they raised in the State court and are attempting to raise in this Court. In the circumstances, they are without standing to attack the constitutionality of the State Constitution, as construed by the State court, because of alleged conflict with the Fourteenth Amendment and certain Federal statutes, in order to support their refusal to perform the ministerial duties imposed on them by the State Constitution, as expounded by the State court and as enforced by its judgment. They will lose nothing by reason of performing these duties. *Smith v. Indiana, supra; Braxton County Court v. West Virginia,* 208 U. S. 192, 197; *Marshall v. Dye,* 231 U. S. 250, 258; *Stewart v. Kansas City,* 239 U. S. 14; *Lampasas v. Bell,* 180 U. S. 276. What the Court said in respect to the appellant in *Smith v. Indiana* is applicable to the petitioner here:

"We think the interest of an appellant in this Court should be a personal, and not an official, interest, and that the defendant, having sought the advice of the courts of his own State, should be content to abide by their decision."

Petitioners have come into this Court with nothing more than a "constitutional point of view"—and that not very plainly stated—whereas, to stay in this Court they must have a case in which they have

"a special, individualized stake."* This Court does not sit "to determine questions of law *in thesi*." *Marye v. Parsons*, 114 U. S. 325, 330.

Petitioners rely on *Coleman v. Miller*, 307 U. S. 433. There jurisdiction was affirmed by the majority because of the view that the Kansas senators who claimed that their votes had been improperly overridden and held for naught

"have a plain, direct and adequate interest in maintaining the effectiveness of their votes. Petitioners come directly within the provisions of the statute governing our appellate jurisdiction. They have set up and claimed a right and privilege under the Constitution of the United States to have their votes given effect and the state court has denied that right and privilege."

Hawke v. Smith, 253 U. S. 221, and *Leser v. Garnett*, 258 U. S. 130, were thought by the majority to be controlling authorities. These cases affirm the legal interest of the voter in protecting the effectiveness of his vote. Their lack of pointed application here is obvious.

The majority opinion in *Coleman v. Miller, supra*, referred to the many cases holding that an officer who rests under legal duty to enforce a statute and whose enforcement of it is prevented by the holding of a State court that the statute violates the Constitution has sufficient legal interest to assail the decision—his interest growing out of his duty to enforce the statute. (307 U. S. 441-446.)

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*Per Mr. Justice Frankfurter, dissenting in Coleman v. Miller, 307 U. S. 433, 467.

Petitioners have not been prevented from performing their duties under the State law; they have not been prevented from enforcing the State law by the holding of a State court that the State law is in conflict with the Constitution of the United States. Instead, they are attempting to avoid the performance of their duties under the State law; they are attempting to prevent the enforcement of the State law as declared by the highest court of the State. Their duties are plainly defined in the State Constitution and at their special instance have been more concretely and definitely stated in the opinion and judgment of the State court. These duties are ministerial in nature and petitioners will lose nothing in performing them. In these circumstances the cases relied on by petitioners are clearly inapplicable. Petitioners have no standing to avoid the performance of their ministerial duties by attempting in this Court to bring about an asserted collision between the State Constitution, as construed by the State court, and the Fourteenth Amendment and certain Federal statutes. A decision by this Court of the questions petitioners are attempting to raise either the one way or the other will not affect petitioners. They are in this Court with a case that they cannot either gain or lose, for no decision the Court may render will confer on them any benefit or cause them any loss.

(b) *The "unjust discrimination" complained of does not affect petitioners.*

Petitioners claim that the State court's interpretation of Sections 33 and 40 of Article XVI of the

State Constitution, as amended in 1932, brings about "unjust discrimination" because it denies "to a large portion of the National Guard membership the equal protection of the laws in violation of the Fourteenth Amendment to the Federal Constitution." (Petition for Certiorari, p. 20.) This claim, thus vaguely stated, amounts to nothing because the victims of this "unjust discrimination" are not complaining. Petitioners do not belong to the class suffering this "unjust discrimination" or represent them and have no right to invoke the Fourteenth Amendment to protect them. *Columbus & Greenville Ry. Co. v. Miller*, 283 U. S. 96, 99; *Ludeling v. Chaffe*, 143 U. S. 301, 305; *Stewart v. Kansas City* 239 U. S. 14; *Marshall v. Dye*, 231 U. S. 250, 258.

(c) *The decision of the State court is based upon a non-federal ground adequate to support it.*

(1) The opinion of the State court expressly shows that its judgment was rested upon its construction of Sections 33 and 40 of Article XVI of the State Constitution, as amended in 1932. After quoting these two sections of the State Constitution (R., 18) the State court said:

"The complete answer to the contentions made by the Attorney General is the plain and specific language used in Sections 33 and 40 of Article 16 of the Constitution, above copied herein. Those amendments reflect the will of the people of the State with reference to the members of the National Guard. The clear policy of this State with respect to that matter is plainly expressed therein. The people have the right to change that policy if they desire.

That right does not rest either with the courts or with any other branch of the State Government. Courts should presume that the people intended to do precisely what they have done in adopting those amendments. This presumption should be indulged in willingly, and not grudgingly." (R., 21.)

Again, concluding its discussion of the question presented, the court said:

"By virtue of Sections 33 and 40 of Article 16 of the Constitution, we hold that Relator did not vacate his office as a member and Chairman and Executive Director of the Texas Unemployment Compensation Commission, when called into the military service of the United States and appointed an officer therein. We further hold that his appointment as Major in the United States Army does not violate Section 12 of Article 16 of the Constitution. Therefore he is entitled to be paid his salary." (R., 22.)

In its opinion on rehearing the State court said:

"The real question before us is: Does relator by being called into the active service of the National Guard of the United States vacate the civil office held by him in the State? We are not called upon to decide whether he vacates his commission in the National Guard of the United States. That is a question for the Federal authorities to decide, and not for us to determine." (R., 67.)

After referring to the case of *Lowe v. State*, 83 Tex. Cr. Rep. 134, and to the case of *Fekete v. City of East St. Louis*, 315 Ill. 58, decided before the State Constitution was amended, the State court further said:

"As pointed out in our original opinion, Sections 33 and 40 of Article 16 of the Constitution of Texas were adopted for the purpose of avoiding the holding in the Lowe case. The case of Thomas L. Fekete, Jr. v. City of East St. Louis, supra, was decided long prior to the adoption of Sections 33 and 40 of Article 16 of the Constitution, and the opinion in that case is not applicable to the case before us. It is not in any way in point, or even persuasive. The case of United States ex rel. v. Dern, Secretary of War, supra, involved the construction of an Act of Congress wherein, in substance, it was provided that under the War Department Appropriation Act of 1933 an officer in the National Guard, receiving a pension from the United States, cannot, without surrendering the pension, receive benefits extended by the Federal Government to members of the State Militia. See act March 4, 1933, sec. 1 (47 Stat. 1589); act June 15, 1933 (48 Stat. 153). Thus it will be seen that the question involved in that case was the right to draw both a pension and compensation under the Federal laws. The question involved here was not involved in that case, and the court did not have before it for construction the provisions of a state constitution similar to Sections 33 and 40 of Article 16 of our Constitution." (R., 67-68.)

(2) Apparently petitioners contend that the State court's construction of the State Constitution puts its provisions in conflict with Section 576, Title 10, U.S.C.A. (Petitioners' Brief, pp. 49-50.) The court's opinion on rehearing shows that its judgment was not based to any extent upon a construction of that statute, although it did point out that, under the terms of that statute, the office vacated is the office in the Army and not the civil office. (R., 67.)

It has been held that this statute applies only to officers of the Regular Army. (Vol. 22, Opinions of the Attorney General, page 88.)

(3) The further claim that the opinion of the State court conflicts in some way not clearly stated with other Federal statutes relating to the National Guard is so plainly untenable that it requires no discussion.

(d) *The Federal questions are without substance.*

The Federal questions attempted to be raised are:

(1) Failure to give proper effect to Section 576, Title 10, U.S.C.A. That section applies only to officers in the Regular Army and, for that and other obvious reasons, has no application here.

(2) The "unjust discrimination" claimed to have resulted from the State court's construction of the State statute. Petitioners have no standing to complain of this discrimination because it does not affect them. Furthermore, the claim that this alleged discrimination violates the Fourteenth Amendment is plainly without merit.

Point Two

If the State court decided any Federal questions, they were correctly decided.

Respondent relied on Sections 33 and 40 of Article XVI of the State Constitution in support of his right to hold his State office and draw his salary

after he had been called into the active military service of the United States (R., 4-6.) On the other hand, petitioners in support of their claim that respondent had vacated his State office relied on Section 12 of Article XVI of the State Constitution (R., 11). The State court, construing the State Constitution, has held that Sections 33 and 40 of Article XVI have controlling effect (R., 18-22).

The State court's construction of the State Constitution is, of course, final, leaving only the question of whether the State Constitution, thus construed, conflicts with the National Constitution or some valid Federal statute.

We have already referred to the claim of unjust discrimination violating the Equal Protection Clause (ante, p. 7). If discrimination exists, it is a sufficient answer that the petitioners are in no way affected by it. Furthermore, petitioners have failed to point out any unreasonable or arbitrary discrimination resulting from the State court's construction of the State Constitution. The discrimination they find is no more than reasonable discrimination by the makers of the State Constitution in defining eligibility to hold a State office.

The claim that the State court's construction of the State Constitution brings it in conflict with Section 576, Title 10, U.S.C.A., is only mildly pressed and is clearly untenable. No effort is made to demonstrate the existence of the conflict and it is plain that the conflict does not exist. The Federal statute referred to applies only to officers in the Regular Army. It defines a test of eligibility to hold a Federal office, whereas the State Constitution, as

construed by the State court, defines a test of eligibility to hold a State office. The two cannot be in conflict.

Petitioners, executive officers of the State whose duties are ministerial in character, have no standing to assail the validity of the State Constitution under which they hold their offices, as construed by the State court; and they have wholly failed to show that the State Constitution, thus construed, is invalid because of conflict with the Federal Constitution or any Federal statute.

Respectfully submitted,

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